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No. 06-823

# In The
# Supreme Court of the United States

MOSHE TAL, BRICKTOWN-2000, INC. and TAL TECHNOLOGIES, INC.,

*Petitioners,*

vs.

DAN RANDOLPH HOGAN, TMK/HOGAN JOINT VENTURE, a.k.a. COMMERCIAL REAL ESTATE SERVICES JOINT VENTURE, HOGAN PROPERTY MANAGEMENT, L.L.C., BRICKTOWN-TMK/HOGAN PARKING, L.L.C., BRICKTOWN-TMK/HOGAN ENTERTAINMENT, L.L.C., STONEGATE MANAGEMENT COMPANY, L.L.C., ELGIN DEVELOPMENT COMPANY, L.L.C., TDC COMPANY, L.L.C., and TIANA DOUGLAS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Tenth Circuit Court Of Appeals**

## RESPONDENTS' BRIEF IN OPPOSITION


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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals properly applied the heightened pleading standard of Fed.R.Civ.P. 9 to Petitioners Tal Technologies, Inc. and Bricktown-2000, Inc.'s allegations of mail fraud and wire fraud?

2. Whether the Tenth Circuit Court of Appeals properly required Petitioners Tal Technologies, Inc. and Bricktown-2000, Inc., who confessed their inability to state a predicate bribery claim under 18 U.S.C. § 201, to move in the district court for permission to file an amended pleading in order to state a different bribery claim rather than allowing them to move to amend, for the first time, in the appellate court?

3. Whether the Tenth Circuit Court of Appeals affirmed the district court's dismissal of Petitioner Moshe Tal's individual claims based on *res judicata* when neither the written decision of the district court nor the appellate decision discussed or analyzed *res judicata* as a basis for the dismissal?

4. Whether Petitioner Moshe Tal has failed to show reversible error with respect to his individual claims when Petitioner Tal failed to appeal the Tenth Circuit Court of Appeals' decision that he lacks standing to pursue, in his individual capacity, a RICO and an Antitrust claim?

5. Whether the Tenth Circuit Court of Appeals properly affirmed the district court's dismissal of Petitioner Tal Technologies, Inc.'s fraudulent condemnation claim for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because Tal Technologies, Inc.'s prior appeal of the Oklahoma County district court's rejection of its fraudulent condemnation claim resulted in a final order that the condemnation was proper?

**QUESTIONS PRESENTED** – Continued

6. Whether the Tenth Circuit Court of Appeals properly affirmed the district court's ruling that Petitioner Bricktown-2000, Inc. could not rely on the fraudulent condemnation allegation as a predicate act to support Bricktown-2000's RICO claim because the City of Oklahoma City, which condemned the property, was named as the "enterprise" for purposes of Petitioners' RICO claim?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Hogan Respondents state:

Respondent TMK/Hogan Joint Venture a.k.a. Commercial Real Estate Services Joint Venture is owned 50% by Stonegate Management Company, L.L.C., which has no corporate parent, and 50% by HPC Investments, L.L.C., which has no corporate parent.

Respondents Hogan Property Management, L.L.C. and Stonegate Management Company, L.L.C. have no corporate parent, nor do any publicly traded companies own 10% or more of their stock.

Respondent Bricktown-TMK/Hogan Parking, L.L.C., now known as Bricktown-SMC/Hogan Parking, L.L.C., is owned 50% by Stonegate Management Company, L.L.C. and 50% by Hogan Property Management, L.L.C.

Respondent Bricktown-TMK/Hogan Entertainment, L.L.C., now known as Bricktown Entertainment, L.L.C., is owned 50% by Stonegate Management Company, L.L.C. and 50% by Hogan Property Management, L.L.C.

Respondent Elgin Development Company, L.L.C. is wholly owned by Stonegate Realty Company, L.L.C., which has no corporate parent.

Respondent TDC Company, L.L.C. is wholly owned by Elgin Development Company, L.L.C., which is wholly owned by Stonegate Realty Company, L.L.C.

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## STATEMENT OF THE CASE

### Introduction.

The litigation below is one installment in a series of related lawsuits filed by Petitioner Moshe Tal ("Tal"), together with one or more of his corporations or affiliated taxpayer protest groups, all revolving around redevelopment projects concerning the Oklahoma City Metropolitan Area Projects ("MAPS"). The MAPS projects, initiated by a one-cent sales tax increase approved by City voters in 1993, were the foundation and centerpiece of the City of Oklahoma City's ("City") attempts to eliminate blight and revitalize its urban core. This urban renewal project was conceived as a series of redevelopment projects intended to revive the collection of old warehouses called "Bricktown," located in southern downtown Oklahoma City. The City Council of Oklahoma City passed a redevelopment plan ("Redevelopment Plan") designed to attract private investors to build sports venues and additional parking and entertainment improvements, and to redevelop the blighted Bricktown area.

Petitioner BT-2000, Inc. ("BT-2000"), a corporation headed by Petitioner Tal, was competing with Respondent Bricktown-TMK/Hogan Entertainment, L.L.C. a.k.a. Bricktown Entertainment, L.L.C. ("TMK/Hogan") for the award of certain redevelopment agreements (the "Redevelopment Agreements") which were part of the City's Redevelopment Plan. However, "after widely publicized hearings and based on an extremely close vote, [the redevelopment rights were] awarded to Bricktown Parking Investors and [Respondent] TMK/Hogan rather than Tal's group." *City of Oklahoma City v. Urban Renewal*, 1999 OK 71, ¶¶ 20, 21, 988 P.2d 901, 905 ("*Tal I*").[1] Also as part of

[1] TMK/Hogan is the only Respondent that was a party to the Redevelopment Agreements. Contrary to Petitioners' statement (Pet. at

(Continued on following page)

its MAPS redevelopment efforts, the City in 1997 condemned 1.4 acres of Petitioner Tal Technologies, Inc.'s ("Tal Tech") Bricktown-area property.

In the intervening 10 years, Petitioners Tal, BT-2000, Tal Tech and others have instituted numerous serial challenges to the validity of both the award and implementation of the Redevelopment Agreements and the condemnation; one such episode was the federal court litigation below filed in 2002 by Petitioners against Respondent TMK/ Hogan, which was awarded the Redevelopment Agreements, as well as Respondents Dan Randolph Hogan, Hogan Property Management, L.L.C., Bricktown-TMK/ Hogan Parking, L.L.C., a.k.a. Bricktown-SMC/Hogan, L.L.C., Bricktown-TMK/Hogan Entertainment, L.L.C. a.k.a. Bricktown Entertainment, L.L.C., Mark D. Elgin, Stonegate Management Company, L.L.C., Elgin Development Company, L.L.C. and TDC Company, L.L.C. (collectively, the "Hogan Respondents"), together with Respondent Tiana Douglas, former executive director of the Oklahoma City Urban Renewal Authority ("OCURA"). Petitioners alleged Respondents were liable for conspiracy to fraudulently condemn Tal Tech's land, conspiracy to monopolize under 15 U.S.C. § 2, racketeering under 18 U.S.C. § 1962, and tortious interference with business under Oklahoma common law.

Because the litigation before the federal district court below is but one installment in a series of challenges brought by Tal and various corporate and taxpayer protest group affiliates to the Bricktown redevelopment efforts, a brief description of such challenges, including the federal district court lawsuit which led to the Petition for a Writ of

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22 n.7), Respondent Bricktown-TMK/Hogan Parking, L.L.C. is not a party to the Redevelopment Agreements.

Certiorari now pending, follows to place that Petition in context.

**A. The State Court Condemnation Proceeding and Petitioner Tal Tech's State Court Appeal.** In March 1997, in furtherance of its urban renewal plan, the City brought a condemnation action, seeking to condemn 1.4 acres owned by Tal Tech adjacent to the Bricktown redevelopment. Tal Tech objected to the condemnation, claiming lack of public necessity or purpose. *City of Oklahoma City v. Tal Tech Inc.*, Case No. 94,045 (Okla.Civ.App. July 31, 2001); *Tal v. Hogan*, 453 F.2d 1244, 1250 (10th Cir. 2006). Overruling the objection, the Oklahoma County district court entered a condemnation order in 1997. In 1999, Tal Tech filed two motions asking the state district court to reconsider the condemnation order, alleging, *inter alia*, that the City's condemnation was fraudulent. That court denied the motions, and Tal Tech appealed to the Oklahoma Court of Civil Appeals, which affirmed the district court's denial of Tal Tech's motions to vacate the condemnation order for fraud. *City of Oklahoma City v. Tal Tech Inc.*, Case No. 94,045 (Okla.Civ.App. July 31, 2001); *Tal*, 453 F.3d at 1250-51. Both the Oklahoma Supreme Court and this Court denied Tal Tech's subsequent petitions for certiorari. *See Tal Techs., Inc. v. City of Okla. City*, Petition for a Writ of Certiorari, No. 01-1147, 2002 WL 32134365 at 1 (Oklahoma Supreme Court's denial of Tal Tech's petition for writ of certiorari was unreported); *Tal Techs., Inc. v. City of Okla. City*, 535 U.S. 987 (2002) ("Petition for writ of certiorari to the Court of Civil Appeals of Oklahoma, Second Division, denied").

**B. *Tal I*: Petitioner Tal's First State Court Challenge to the Award of the Redevelopment Agreements.** In 1999, Tal and a group of taxpayers he formed

known as Taxpayers Against Ripoffs or "TAR"[2] challenged the award of the Redevelopment Agreements to Respondent TMK/Hogan by delivering to the City a *qui tam* written demand concerning several MAPS-related transactions. Among other things, Tal and TAR demanded that the City declare the Redevelopment Agreements void and illegal and file suit against the parties thereto to recover damages and obtain a judicial declaration of the Redevelopment Agreements' alleged invalidity.

Tal and TAR's challenge was brought pursuant to Oklahoma's *qui tam* statutes, Okla. Stat. Ann., Tit. 62 §§ 372-374, which allow a citizen to bring a suit on behalf of a governmental entity for "the recovery of any money or property belonging to" that entity, but only after the entity has refused, failed, or neglected to institute proceedings for the recovery of its money or property after being served with a written demand by ten resident taxpayers with respect to an "unauthorized, unlawful, fraudulent, or void contract." Okla. Stat. Ann., tit. 62 §§ 372-374.

In response to Tal and TAR's demand, on January 26, 1999, the City filed a declaratory judgment action in Oklahoma County district court against the private parties to the Redevelopment Agreements and OCURA, requesting that, should that court find the Redevelopment Agreements invalid, it declare them void and order the return of money and property involved in the agreements to the City, or should the district court judicially confirm the Redevelopment Agreements' validity, it declare them valid.

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[2] "TAR" became Taxpayers for Honest Government," or "THG." *See Oklahoma City Urban Renewal Authority v. City of Oklahoma City*, 2005 OK 21, n.4, 10 P.3d 550.

The Oklahoma County district court denied Tal and TAR's attempt to intervene in the trial. *Tal I*, 1999 OK 71, 988 P.2d at 905 (public officials responded to taxpayers' written demand in good faith and taxpayers have failed to show grounds to intervene). That court entered a judgment declaring that the Redevelopment Agreements were "valid, lawful and constitutional in all respects and should be enforced." Further, the court entered a permanent injunction, requiring the parties to perform their obligations under the Redevelopment Agreements. The Oklahoma Supreme Court affirmed the district court's denial of Tal and TAR's motion to intervene. *Tal I*, 1999 OK 71, ¶¶ 17, 20, 988 P.2d 901, 906 ("there is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council.").

**C. *Tal II*: Petitioner Tal's Challenges to the Bricktown Ballpark Stadium Leases.** Next, Tal and TAR used Oklahoma's *qui tam* statutes to challenge the validity of a lease and sublease related to the new baseball stadium constructed in Bricktown as part of the MAPS projects. *State ex rel. Tal v. Norick*, 1999 OK 85, 991 P.2d 999 ("*Tal II*"). The City responded by filing a declaratory judgment action in Oklahoma County district court; after trial, that court ruled that Tal and TAR's accusations were unsupported, and that the Ballpark lease and sublease were valid and constitutional in all respects. While that declaratory judgment action was still pending, however, Tal and TAR filed an independent *qui tam* action in Oklahoma County district court challenging the leases and requesting treble damages. That independent action was dismissed by the Oklahoma County district court for lack of standing, and the Oklahoma Supreme Court affirmed. *Tal II*, 1999 OK 85, ¶ 9, 991 P.2d at 1001. Several years

later, Tal attempted to revive the same *qui tam* challenge in Oklahoma County district court by seeking to vacate the district court's *Tal II* judgment and filing an independent *qui tam* action. That iteration of Tal's ballpark related *qui tam* challenge was also dismissed, and the dismissal was affirmed on appeal. *See State ex rel. Tal v. Oklahoma City Athletic Club, Inc.*, in the District Court for Oklahoma County, Oklahoma; No. CJ-2003-3176; filed April 14, 2003 and Journal Entry of Judgment dismissing action, filed April 15, 2004.

**D. *Tal III*: Petitioner Tal's State Court Lawsuit Attacking the *Tal I* Judgment Which Declared the Redevelopment Agreements to be Valid and Constitutional in All Respects.** In March 2000, Tal and TAR sued the City, OCURA, Respondent TMK/Hogan and many others in an Oklahoma County district court *qui tam* action based on the very same *qui tam* challenge resulting in *Tal I*. That court dismissed as to all defendants based on the *Tal I* judgment and appeal, and Tal and TAR once again appealed to the Oklahoma Supreme Court. In *State ex rel. Tal v. City of Oklahoma City*, 2000 OK 70, 19 P.3d 268 (*per curiam*) ("*Tal III*"), the Oklahoma Supreme Court held that Tal and TAR were attempting to relitigate issues "clearly and unequivocally" disposed of in *Tal I*. *See Tal III*, 2000 OK at ¶ 6, 19 P.3d at 272. Tal and TAR's petition for a writ of *certiorari* to this Court was denied. *Oklahoma ex rel. Tal v. City of Okla. City*, 534 U.S. 814 (2001).[3]

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[3] At least three other Oklahoma County district court actions filed by one or more of the Petitioners and related to the MAPS/Bricktown redevelopment projects are pending. First, there is litigation in Oklahoma County district court involving the MAPS related Bass Pro Shops development in Bricktown, resulting from a *qui tam* demand made by Tal and THG. *See Oklahoma City Urban Renewal Authority v. City of Oklahoma City*, CJ-2003-2826, Oklahoma County district court,

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**E. This Action: Petitioners' Federal Court Litigation.** On March 14, 2002, Petitioner Tal and his affiliated corporations Petitioners Tal Tech and BT-2000 filed a complaint in the United States District Court for the Western District of Oklahoma challenging, among other things, the award of the Redevelopment Agreements. Defendants included Tiana Douglas, then executive director of OCURA, and Respondent TMK/Hogan, a party to the Redevelopment Agreements. Among other arguments advanced was that the Redevelopment Agreements were obtained via an anti-competitive conspiracy in violation of federal and state antitrust laws, and that the alleged conspiracy violated the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(b), (c) and (d). Petitioner Tal Tech also alleged that the City's condemnation of the property was fraudulent, and Tal Tech and BT-2000 also alleged that the "fraudulent" condemnation was one predicate act to support their RICO claim. The federal district court dismissed Petitioner Tal's claims in their entirety for lack of standing on October 31, 2001, and dismissed the claims of Petitioners Tal Tech and BT-2000, as amended, on September 20, 2003. Tal and his affiliates appealed the dismissals to the

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2005 OK 2, 110 P.3d 550. Second, there is litigation pending in Oklahoma County district court involving another MAPS related Bricktown redevelopment project, brought by Petitioners Tal and Tal Tech, which includes as one claim yet another Tal Tech challenge to the 1997 condemnation. (Pet. at 7, n.2) Third, there is pending a suit filed by Tal against the Oklahoma County district court judge who presided over the proceedings in *Tal II*, and against numerous attorneys, municipal officials and private parties for, *inter alia*, tortious interference with contract, malicious prosecution and abuse of process. All but one of the defendants have been dismissed based on Tal's failure to state a claim. *See Tal v. Humphreys*, CJ-2003-10498, Oklahoma County District Court.

Tenth Circuit Court of Appeals, which affirmed. *See Tal v. Hogan*, 453 F.3d at 1250. Petitioners' Petition for Rehearing was denied by the federal appellate court on September 11, 2006. Thereafter, Petitioners filed their Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals which was docketed on December 14, 2006. The Hogan Respondents oppose the granting of certiorari, and respectfully submit this Brief in Opposition.

## REASONS FOR DENYING A WRIT OF CERTIORARI

### I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS TAL TECH AND BT-2000 FAILED TO DEMONSTRATE THAT THE TENTH CIRCUIT DECIDED A MATTER IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS, AND THE ISSUE RAISED BY PETITIONERS IS NOT A QUESTION OF FIRST IMPRESSION AND DOES NOT INVOLVE AN IMPORTANT ISSUE OF FEDERAL LAW.

In seeking certiorari, Petitioners Tal Tech and BT-2000 represent that the Tenth Circuit Court of Appeals applied the heightened pleading standard found in Fed.R.Civ.P. 9 to *all* elements of their RICO claim and further argue it as error for that court to do so. (Pet. at 11, 18-19) Instead, Petitioners Tal Tech and BT-2000 argue, the Fed.R.Civ.P. 8(a) notice pleading standard should have been applied to each element of their RICO claim. (Pet. at 11) For the following reasons, Petitioners Tal Tech and BT-2000's request for certiorari on those grounds should be denied. First, the Tenth Circuit Court of Appeals did not apply Rule 9's heightened pleading standard to any element of Petitioners' RICO claim, other than those involving wire fraud or mail fraud. Second, the application

of Rule 9's heightened pleading standard to the wire fraud and mail fraud elements did not result in the dismissal of Petitioners' Second Amended Complaint. Third, Petitioners have failed to demonstrate that the decision of the federal appellate court was in conflict with a decision of this Court or any other federal circuit court.

### A. Summary of the Tenth Circuit's Decision with Respect to the RICO Claim.

The Tenth Circuit Court of Appeals properly identified the four elements of Petitioners Tal Tech and BT-2000's RICO claim: "(1) investment in, control of, or conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity." *Tal v. Hogan*, 453 F.3d at 1261 (*citing* 18 U.S.C. § 1962(a), (b), & (c)). The court explained that "[r]acketeering activity" is defined as "any 'act which is indictable' under federal law and specifically includes mail fraud, wire fraud and racketeering."[4] *Id.*

In determining the sufficiency of Petitioners' Second Amended Complaint,[5] the court focused on the fourth element of Petitioner's RICO claim and examined Petitioners' allegations that Respondents "engaged in predicate acts of mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343 and bribery in violation of 18 U.S.C. § 201." *Id.* at 1262.

The federal appellate court applied Rule 9's heightened pleading standard to the allegations of mail fraud

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[4] The court noted that these underlying acts are often called "predicate acts" because "they form the basis for liability under RICO." *Id.* at 1261 (*citing BankOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999)).

[5] Petitioner Tal's RICO claim was dismissed with prejudice by the federal district court.

and wire fraud and determined that Petitioners Tal Tech and BT-2000 adequately alleged two instances of mail fraud, *Id.* at 1265-66, and three instances of wire fraud, *Id.* at 1266.[6] The court recited that Petitioners Tal Tech and BT-2000 "conceded to the district court that they could not state a claim against Douglas under the federal anti-bribery statute" because there was no allegation that she was acting on behalf of the federal government. *Id.* at 1267. Thus, the court found Petitioners Tal Tech and BT-2000 failed to sufficiently allege bribery as a predicate act. *Id.* Thereafter, the appellate court "assume[d] for purposes of [its] opinion that the predicate acts alleged by [BT-2000 and Tal Tech] establish[ed] a pattern of racketeering activity." *Id.* at 1268.

The appellate court next considered whether the pattern of racketeering activity it assumed to exist was sufficient to state a claim under 18 U.S.C. § 1962(b), (c) or (d). *Id.* In doing so, the court found Petitioners' allegations insufficient under § 1962(b) because Petitioners Tal Tech. and BT-2000 "did not adequately allege the defendants acquired or maintained an interest in or control of the Renewal Authority or the city council." *Id.* at 1269. The court found Petitioners' § 1962(c) claim failed because Petitioners' failed to allege that the acts of mail and wire fraud allowed the Respondents to participate "in the operation or management of the Renewal Authority and the city council." *Id.* at 1270. Finally, the appellate court concluded that because Petitioners "failed to allege a

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[6] The Hogan Respondents deny, as they did in the lower courts, that they committed any acts constituting mail fraud or wire fraud. They simply acknowledge that for purposes of their Rule 12(b)(6) motion to dismiss, the untested allegations of Petitioners' Second Amended Complaint are, according to the appellate court, sufficient to withstand a motion to dismiss.

sufficient claim under subsections (b) or (c), their subsection (d) conspiracy fail[ed] as a matter of law." *Id.*

### B. Application of Rule 9 to Petitioners' Second Amended Complaint.

As set forth above, Petitioners Tal Tech and BT-2000 allege that the federal appellate court applied "the heightened pleading requirement of Fed.R.Civ.P. 9(b) [to] all elements of RICO alleged in a complaint." (Pet. at 14) Petitioners Tal Tech and BT-2000's position finds no support in the record that is before this Court or in the decision of the Tenth Circuit Court of Appeals.

In attempting to state a RICO claim, Petitioners Tal Tech and BT-2000 alleged that "Defendants engaged in predicate acts of mail fraud, wire fraud and bribery." *Tal*, 453 F.3d at 1263. In reviewing the district court's dismissal of the RICO claim, the Tenth Circuit Court of Appeals held that "[t]he particularity requirement of Rule 9(b), Federal Rules of Civil Procedure, applies to claims of mail and wire fraud."[7] *Id.* (*citing Robbins v. Wilkie*, 300 F.3d 1208, 122 (10th Cir. 2002); *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-90 (10th Cir. 1992); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989)). Thus, the appellate court applied Rule 9's heightened pleading standard only to Petitioners' allegations of wire fraud and mail fraud. *Id.* All of the other elements of Petitioners' RICO claim which were discussed by the appellate court were reviewed based

[7] As discussed below, Petitioners Tal Tech and BT-2000 acknowledge and concede that Rule 9's heightened pleading standard is applicable to allegations of fraud: "Where a predicate act for purposes of RICO does not sound in fraud, a RICO claimant need only comply with the general pleading requirements of Rule 8(e)(1) and not the heightened pleading requirements of Rule 9(b)." (Pet. at 16-17)

on the notice pleading standard of Fed.R.Civ.P. 8(a). *Id.* at 1268-70.

On this point, the appellate court's decision is wholly consistent with prior decisions of that court. Specifically, the Tenth Circuit's decision to apply the heightened pleading standard of Fed.R.Civ.P. 9(b) to determine the sufficiency of an allegation of mail fraud and wire fraud when those acts are relied on as the predicate acts in a RICO case, finds support in sixteen years of unwavering precedent. *See Robbins*, 300 F.3d at 1211 (noting Rule 8 applied to all elements of a RICO claim except for "acts predicated upon fraud"); *Farlow*, 956 F.2d at 989-90 ("plaintiffs must sufficiently allege . . . predicate acts of racketeering with particularity"); and *Cayman*, 873 F.2d at 1362 ("Rule 9(b) requires particularity in pleading RICO mail and wire fraud.").

Moreover, Petitioners have failed to demonstrate that the federal appellate court's decision is contrary to a decision from this Court. Although Petitioners cite two cases which reject – in different situations – the application of Rule 9's heightened pleading standard, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Neither of those cases compels a result different than that reached by the Tenth Circuit. In *Swierkiewicz*, this Court rejected the Second Circuit Court of Appeals' requirement that a plaintiff in an employment discrimination case "plead a prima facie case of discrimination in order to survive respondent's motion to dismiss." *Id.* at 510. The Court's rationale was four-fold. First, the *McDonnell Douglas*[8] prima facie case "is an evidentiary standard, not a pleading requirement. *Id.* at 510. Second,

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[8] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

the Court noted that requiring "a plaintiff to plead facts establishing a prima facie case" is inappropriate "because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. Third, the Court reiterated that "the precise requirements of a prima facie case can vary depending upon the context." *Id.* at 512. Finally, this Court noted that employment discrimination claims were not the type of claims that are specifically exempted by Fed.R.Civ.P. 9(b) from the "short and plain statement" requirement of Fed.R.Civ.P. 8. *Id.* at 512-13, 515.

The second case cited by Petitioners Tal Tech and BT-2000 is likewise inapposite. In *Leatherman*, the Court was called to review a decision of the Fifth Circuit Court of Appeals which had applied a heightened pleading standard to judge the sufficiency of a complaint alleging municipal liability under 42 U.S.C. § 1983. *Id.* at 164. In rejecting the more stringent standard applied by the Fifth Circuit, this Court stated: "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. In both cases, however, this Court noted that a heightened pleading standard was applied appropriately to actions sounding in fraud. *Swierkiewicz*, 534 U.S. at 513; *Leatherman*, 507 U.S. at 168. As noted above, the Tenth Circuit below limited its application of the heightened pleading standard of Fed.R.Civ.P. 9(b) to Petitioners Tal Tech and BT-2000's "claims of mail and wire fraud." *Tal*, 453 F.3d 1244.

Although not cited by Petitioners Tal Tech and BT-2000, the Hogan Respondents note that the decision of the Tenth Circuit at issue herein is consistent with this Court's discussion of Rule 9 and its potential application to the fraud elements of RICO claims. *See Rotella v. Wood*,

528 U.S. 549 (2000) (assuming Rule 9 will "exact some cost" on plaintiffs attempting to plead a RICO claim).

Finally, the application of the heightened pleading standard of Fed.R.Civ.P. 9(b) to determine the sufficiency of the pleading of the predicate acts of mail fraud and wire fraud in a RICO case does not conflict with any decision cited by Petitioners Tal Tech and BT-2000. Rather, the Tenth Circuit Court of Appeals' decision on this point is wholly consistent with all of the federal appellate courts[9] that have addressed the issue: *First Capital Asset Mgmt., Inc. v. Satinwood*, 385 F.3d 159, 178-79 (2nd Cir. 2004); *Lum v. Bank of America*, 361 F.3d 217, 223 (3rd Cir. 2004); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 921 (8th Cir. 2001); *Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997); *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997); *McDonald v. Schenecker*, 18 F.3d 491, 495 (7th Cir. 1994); *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992); *Lancaster Commun. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir.

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[9] Hogan Respondents note that none of the cases cited by Petitioners Tal Tech and BT-2000 in their Petition demonstrate that the Tenth Circuit Court of Appeals erred by applying Fed.R.Civ.P. 9(b) to determine the sufficiency of the allegations of mail fraud and wire fraud in the Second Amended Complaint. For example, Petitioners cite *Haroco, Inc. v. American National Bank & Trust of Chicago*, 747 F.2d 384, 404-05 (7th Cir. 1984); *Otto v. Variable Annuity Life Insurance*, 814 F.2d 1127, 1136 (7th Cir. 1986); *United States v. Neopolitan*, 791 F.2d 489, 499-500 (7th Cir. 1986) (since this case was a criminal prosecution, neither Fed.R.Civ.P. 8 nor 9(b) would apply); and *Westways World Travel v. AMR Corp.*, 182 F.Supp. 2d 952, 955 (C.D. Cal. 2001). None of those cases discuss, much less reject, the application of Fed.R.Civ.P. 9(b) to allegations of mail fraud and wire fraud. However, as noted herein, both the Seventh and the Ninth Circuit Courts of Appeals have found that the heightened pleading standard of Rule 9(b) should be applied to the allegations of mail fraud and wire fraud in a RICO case.

1991); *Cayman*, 873 F.3d at 1362 (cataloging cases); *Michael Building Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988); and *Formax, Inc. v. Hostert*, 841 F.2d 388, 391 (C.A. Fed. 1988) (applying Seventh Circuit's approach).

Accordingly, as Petitioners Tal Tech and BT-2000 have failed to demonstrate that the Tenth Circuit Court of Appeals' decision conflicts with any decision of this Court or any decision of another circuit court and because the Tenth Circuit Court of Appeals' decision rests squarely on the plain language of Fed.R.Civ.P. 9(b), this Court should decline to grant certiorari review.

### C. Petitioners Confess Rule 9's Heightened Pleading Standard is Applicable to the Predicate Acts of Mail Fraud and Wire Fraud.

As discussed above, the Tenth Circuit Court of Appeals applied Rule 9's heightened pleading standard to only two matters: the factual allegations supporting Petitioners Tal Tech and BT-2000's allegations of mail fraud and wire fraud. *Tal*, 453 F.3d at 1263. Petitioners, in their Petition for a Writ of Certiorari, admit that the "heightened standard of pleading" is properly applied to their "claims for the predicate acts of fraud." (Pet. at 14, 16-17, 18) Thus, by their own admission, the Tenth Circuit Court of Appeals properly applied Rule 9 to their RICO claim to the extent that claim was predicated on alleged acts of mail fraud and wire fraud. Accordingly, this Court should decline to grant certiorari review.

### D. The Appellate Court's Application of Rule 9 did not Result in the Dismissal of Petitioners Tal Tech and BT-2000's RICO Claims.

Petitioners Tal Tech and BT-2000 are correct to the extent they claim the Tenth Circuit Court of Appeals

applied Rule 9 to their claims of mail fraud and wire fraud. *Tal*, 453 F.3d at 1263-67. However, that court's application of the heightened pleading standard, which they claim is error, did not result in the dismissal of Petitioners' Second Amended Complaint.[10] Rather, in applying Rule 9, the appellate court reversed the district court and found that Petitioners "sufficiently alleged" two acts of mail fraud – "the alleged 'Torchmark misrepresentation,'" *Id.* at 1266, and the May 18, 1998 letter authored by Mr. Tolbert, *Id.* The appellate court also found that Petitioners sufficiently alleged three instances of wire fraud. *Id.* Finally, the court presumed, for purposes of its opinion, that the acts of alleged mail fraud and wire fraud "establish a pattern of racketeering activity." *Id.* at 1268.[11] Thus, in the only instance where the appellate court applied Rule 9's heightened pleading standard, that court found the allegations of the Second Amended Complaint sufficient to withstand the motion to dismiss. Therefore, the error of which Petitioners Tal Tech and BT-2000 complain – the application of Rule 9 – did not result in the dismissal of their Second Amended Complaint. Accordingly, this Court should decline to grant certiorari review.

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[10] In a different subpart of their *Petition*, Petitioners Tal Tech and BT-2000 admit as much. (Pet. at 18)

[11] Petitioners Tal Tech and BT-2000's discussion of the application of Rule 9 to the allegations regarding the existence of an "enterprise" (Pet. at 16-17) is inapposite as the federal appellate court did not consider or decide whether Petitioners Tal Tech and BT-2000 sufficiently identified an enterprise. Stated differently, the existence or non-existence of an enterprise was not a matter explicitly or implicitly encompassed by the appellate court's decision. *Tal*, 453 F.3d at 1261-70.

## II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS TAL TECH AND BT-2000 CONCEDED THEIR FAILURE TO STATE A CLAIM UNDER 18 U.S.C. § 201 TO THE DISTRICT COURT AND DID NOT SEEK LEAVE, FROM THAT COURT, TO FILE A THIRD AMENDED COMPLAINT TO ATTEMPT TO STATE A DIFFERENT BRIBERY CLAIM.

Petitioners Tal Tech and BT-2000 argue that the appellate court erred in affirming the district court's dismissal of their RICO claim because their allegations of bribery were sufficient, under Fed.R.Civ.P. 8 to state a bribery claim under Okla. Stat. Ann., tit. 21 § 381. (Pet. at 18-19) In doing so, however, Petitioners Tal Tech and BT-2000 ignore the plain language of their Second Amended Complaint; ignore their admissions and concessions made to the district court; ignore their failure to request leave from the district court to file a third amended complaint; and ignore the legal authority underlying the appellate court's determination.

Initially, the Hogan Respondents note that the language of Petitioners Tal Tech and BT-2000's Second Amended Complaint was very specific when it alleged that the Defendants committed bribery in violation of 18 U.S.C. § 201 (Pet. App., pp. 162-65, ¶179) Thus, by the very specific language of that pleading, Petitioners limited their bribery claim to one arising under § 201.

Next, in *Plaintiffs' Combined Response to All Defendants' Motions to Dismiss*, Petitioners Tal Tech and BT-2000 conceded that a claim against Respondent Douglas was not (and could not be) stated under the federal anti-bribery statute, 18 U.S.C. § 201. (Pet. App. at 61, 334); *Tal*, 453 F.3d at 1267. Counsel argued, however, that Petitioners Tal Tech and BT-2000 stated a claim for bribery under Okla. Stat. Ann., tit. 21 § 381. (*Id.*) However, at no time

did Petitioners Tal Tech and BT-2000 request leave of the district court to file a third amended complaint "in order to allege a violation of a state anti-bribery statute." *Tal*, 453 F.3d at 1267. (Pet. App. at 61) It was not until after judgment was entered by the district court and Petitioners Tal Tech and BT-2000 filed their brief in chief in the appellate court that they requested the federal appellate court grant them leave to file a third amended complaint "to amend and clarify" any "unclear allegations" which may be pointed out to them by the appellate court. *Tal*, 453 F.3d at 1267.

While Petitioners Tal Tech and BT-2000 attempt to twist the district court's dismissal and the appellate court's decision into one relating to the adequacy of their pleading (Pet. at 18-19), that is simply not a fair reading of the district and appellate courts' decisions. Rather, the only reviewable issue encompassed by the appellate court's decision is whether it was error for the appellate court to require Petitioners Tal Tech and BT-2000 to move in the district court to amend their pleading instead of moving to amend, for the first time, in the appellate court. *Tal*, 453 F.3d at 1267.

In this vein, the Hogan Respondents note that it is well settled that a party is required to move in the district court to amend its pleading, either a complaint or an answer, rather than to move to amend for the first time in the appellate court after judgment has been entered. *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1088 (10th Cir. 2005) (collecting cases).

Accordingly, as Petitioners Tal Tech and BT-2000 have failed to demonstrate any error arising from the appellate court's decision with respect to the dismissal of their bribery claim, this Court should decline to grant certiorari.

## III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER TAL HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN THE APPELLATE COURT'S DECISION TO AFFIRM DISMISSAL OF HIS INDIVIDUAL CLAIMS.

In the final section of the Petition, Petitioner Tal argues the appellate court erred by finding his personal causes of action are barred by *res judicata* as a result of his participation as a *qui tam* relator in prior litigation. (Pet. at 25-30) In doing so, however, Petitioner Tal admits that "the Tenth Circuit did not address the *res judicata* issues against Moshe Tal even though the issues were well-briefed in his Opening Brief and the Joint Petition for Rehearing." (Pet. at 25, n.12) Rather, Petitioner Tal, who appears before this Court *pro se*, assumes the appellate court "in effect" affirmed the district court's ruling on the issue of *res judicata* even though that court never mentioned, discussed or analyzed the *res judicata* issue. (Pet. at 25, n.12) However, on this point, Petitioner Tal's assumption is clearly belied by the record.

In its opinion, the appellate court stated: "The district court dismissed Tal's individual antitrust and RICO claims in the First Amended Complaint for lack of standing."[12] *Tal*, 453 F.3d at 1252. That description of the basis of the district court's dismissal is borne out by a review of the record. In his October 31, 2002, Enter Order, Judge Friot ruled that Petitioner Tal's claims should be denied because he lacked standing. (Pet. App. at 79) Judge

[12] For the record, the Hogan Respondents note that the appellate court affirmed the dismissal of Petitioner Tal's individual claims on the same basis set forth by the district court in its October 31, 2002, Enter Order: a lack of standing. *Tal*, 453 F.3d at 1253-54.

Friot's dismissal of Petitioner Tal's individual claims was not based on *res judicata*.[13] *Id.*

Accordingly, because Petitioner Tal devotes more than four pages of his request for certiorari to arguing an issue not decided by the appellate court, this Court should decline to grant certiorari review. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily do not decide in the first instance issues not decided below.").

## IV. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER TAL HAS NOT APPEALED THE FINDING THAT HE LACKS STANDING TO PURSUE HIS INDIVIDUAL RICO AND ANTI-TRUST CLAIMS.

The federal appellate court affirmed the dismissal of Petitioner Tal's individual claims because that court agreed that he "does not have standing to assert his individual RICO and antitrust claims." *Tal*, 453 F.3d at 1254. Petitioner Tal has not sought review of that ruling. Accordingly, as the issue of whether Petitioner Tal lacks standing is a final decision, a reversal of the *res judicata*

[13] The Hogan Respondents acknowledge that the district judge's oral announcement of his anticipated ruling mentioned *res judicata* as a possible basis for the dismissal of Petitioner Tal's claims. However, the Enter Order the district judge caused to be filed in the case stated only *one* basis for the dismissal of Petitioner Tal's claims: a lack of standing. (Pet. App. at 79) Accordingly, as that is the only basis for the dismissal found in the federal district court's written order, it was the only basis considered on appeal by the Tenth Circuit Court of Appeals. *Tal*, 453 F.3d at 1252. Moreover, it is the uniform rule that in civil matters, oral rulings are superseded by the courts' written orders. *See O'Neill v. AWGI Lines*, 74 F.3d 93, 95 (5th Cir. 1996) (appellate court does not consider district court's oral statements as to grounds for ruling to the extent they conflict with grounds contained in the subsequent written order).

issue would not result in a reinstatement of Petitioner's Tal's claims. Rather, even if his claims were not barred by *res judicata* (an issue never decided by the appellate court), the decision that he lacks Article III standing, *id.*, would bar his pursuit of those claims. As such, this Court should decline to grant certiorari review.

## V. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS TAL TECH AND BT-2000 FAILED TO DEMONSTRATE THAT THE TENTH CIRCUIT APPLIED THE *ROOKER-FELDMAN* DOCTRINE IN CONFLICT WITH A DECISION OF THIS COURT AND OTHER FEDERAL COURTS, AND THE ISSUE RAISED BY PETITIONERS DOES NOT INVOLVE AN IMPORTANT ISSUE OF FEDERAL LAW.

Petitioner Tal Tech contends that the federal appellate court erred in affirming dismissal of Tal Tech's fraudulent condemnation claim as barred by the *Rooker-Feldman* doctrine. (Pet. at 20-21) In that regard, Petitioner Tal Tech argues that the appellate court erred because, although Tal Tech has exhausted its state court appellate remedies with respect to any challenge to the propriety of the condemnation itself, resulting in a fully final state court judgment as to the propriety of the condemnation, there remains pending Tal Tech's demand for a jury trial as to the *size* of the resulting condemnation award, as well as Tal Tech's new state court challenge to the Oklahoma County district court judgment that the condemnation was proper. (Pet. at 24-25) Further, Petitioners Tal Tech and BT-2000 allege that the federal appellate court wrongly applied *Rooker-Feldman* via privity to prevent Tal Tech and BT-2000 from both 1) bringing a claim for fraudulent condemnation and 2) using fraudulent condemnation as a predicate act to support their respective RICO claims.

For the following reasons, Petitioners Tal Tech and BT-2000's request for certiorari on those grounds should be denied.

### A. Application of *Rooker-Feldman* Doctrine to Tal Tech's Fraudulent Condemnation claim.

#### 1. Summary of Tenth Circuit's decision with respect to Tal Tech's fraudulent condemnation claim.

The Tenth Circuit Court of Appeals applied the *Rooker-Feldman* doctrine to Petitioner Tal Tech's fraudulent condemnation claim because Tal Tech, which as owner of the property condemned was the only party with standing to challenge the propriety of the 1997 Oklahoma County district court condemnation judgment, had previously unsuccessfully challenged the condemnation judgment as improper and fraudulent, and the resulting state court judgment was final. *Tal*, 453 F.3d at 1256. Further, the federal appellate court applied the *Rooker-Feldman* doctrine to Tal Tech's attempt to use the fraudulent condemnation claim to serve as a predicate act to support Tal Tech's RICO claim. *Id.* at 1263.

#### 2. The Tenth Circuit did not use the concept of privity to extend application of *Rooker-Feldman* to non-parties to prior litigation.

Petitioners further claim (Pet. at 21) that the federal appellate court "erred in using the concept of privity" in its application of the *Rooker-Feldman* doctrine. In this regard, Petitioners claim the federal appellate court used a prior judgment entered in a state court *qui tam* proceeding

known as *Tal I*,[14] as the basis for its *Rooker-Feldman* holding, despite the fact that neither Tal Tech nor BT-2000 were parties to the *Tal I* litigation. (Pet. at 20-23) Hogan Respondents point out that, to the contrary, the federal appellate court based application of the *Rooker-Feldman* doctrine on Tal Tech's prior final Oklahoma County district court condemnation judgment.[15] Specifically, the federal appellate court ruled that the finality of Tal Tech's unfavorable Oklahoma County district court condemnation judgment precluded an "appeal" or collateral attack on that state court judgment in the lower federal courts. *Tal*, 453 F.3d at 1250-51, 1256-57. Further, the *Rooker-Feldman* holding was only against Petitioner Tal Tech's claims. *Id.* As Tal Tech was a party to the Oklahoma County district court condemnation action, the appellate court did not rely on a privity finding in applying *Rooker-Feldman*.

On this point, Petitioners Tal Tech and BT-2000 do not dispute that, in the Oklahoma County district court condemnation action, Tal Tech "objected to the condemnation, challenging the public necessity of the taking," and that the "trial court overruled [Tal Tech's] objection and entered a condemnation order on August 28, 1997. . . . " *Id.* at 1250. Likewise, Petitioners do not challenge the fact that "[o]n September 28 and November 2, 1999, almost two years after entry of the condemnation order, [Tal Tech] filed two motions to reconsider the condemnation order based on newly discovered evidence. . . . [claiming] the City had fraudulently deceived the court and delivered the

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[14] See discussion of *Tal I* at pages 3-5, *supra*.

[15] The federal district court's reference to the *qui tam* action known as *Tal I* was made simply to document that the property condemned was part of a parcel ultimately sold by OCURA for fair market value. *Id.* at 1256.

land to the Renewal Authority for sale to private developers, which [Tal Tech] argued was a non-public use." *Id.* at 1251. Finally, Petitioners do not challenge the fact that Tal Tech "appealed to the Oklahoma Court of Civil Appeals" which affirmed the condemnation order after "construing the appeal as alleging that the City had obtained the condemnation order by fraud." *Id.*, *citing City of Oklahoma City v. Tal Techs., Inc.*, Case No. 94,045 (Okla. Civ. App. July 31, 2001). Nor do Petitioners dispute that this Court denied Tal Tech's subsequent certiorari petition. *See Tal Techs., Inc. v. City of Okla. City*, 535 U.S. 987 (2002) ("Petition for writ of certiorari to the Court of Civil Appeals of Oklahoma, Second Division, denied"). In fact, Petitioners concede that "there was an interlocutory appeal of the judgment holding that the condemnation was for a proper public purpose." (Pet. at 24)

It was the resulting final 1997 condemnation order that the Tenth Circuit Court of Appeals ruled could not be subsequently challenged in the lower federal courts, stating that "the district court correctly concluded that the *Rooker-Feldman* doctrine precluded [Tal Tech's] condemnation claim in federal court. Oklahoma courts squarely rejected [Tal Tech's] claims that the initial condemnation order had been obtained through fraud on the part of the City. . . . " *Tal*, 453 F.3d at 1256. Plainly, the federal appellate court used the final state court condemnation order as the basis for application of *Rooker-Feldman*, not the state court opinion in *Tal I*.

Further, Petitioners misrepresent, or at best, misapprehend, both the federal appellate court's ruling with respect to *Rooker-Feldman* and this Court's opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). Contrary to Petitioners' argument, this Court's opinion in *Exxon Mobil* is entirely consistent with the Tenth Circuit's application of *Rooker-Feldman*.

In *Exxon Mo* this Court held that the *Rooker-Feldman* doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of those judgments." 544 U.S. at 284.

Hogan Respondents point out that Tal Tech precisely fits the definition of the "state-court loser" set out in *Exxon Mobil* as the proper subject of the jurisdictional bar imposed by *Rooker-Feldman*. Tal Tech contested the condemnation judgment in 1997 before the Oklahoma County district court and lost, appealed the condemnation order to the Oklahoma Court of Civil Appeals as fraudulent and lost, sought certiorari review in the Oklahoma Supreme Court without success, and finally was denied certiorari review by this Court. *City of Okla. City v. Tal Techs., Inc.*, Case No. 94,045 (Okla. Civ. App. July 31, 2001); *Tal Techs., Inc. v. City of Okla. City*, 535 U.S. 987 (2002); *Tal*, 453 F.3d at 1251.

Finally, Hogan Respondents concede that this Court's decision in *Lance v. Dennis* held that, in general, the *Rooker-Feldman* doctrine does not deprive a federal court of jurisdiction over claims of parties who were neither party to the pertinent state court action nor in a position to appeal and seek review of the state court's judgment. 126 S.Ct. 1198, 1202-03 (2006). However, wholly consistent with *Lance*, here the federal appellate court held that it lacked subject matter jurisdiction only as to the claim of Tal Tech, which was a party to and did appeal the Oklahoma County district court condemnation judgment. *City of Okla. City v. Tal Techs., Inc.*, Case No. 94,045 (Okla. Civ. App. July 31, 2001); *Tal*, 453 F.3d at 1256-57. Stated conversely, the Tenth Circuit Court of Appeals did not rely upon *Rooker-Feldman* to affirm dismissal of any claim of

Petitioner BT-2000. *Id.* Petitioners have not stated a ground for the grant of certiorari.

### B. The Tenth Circuit's Treatment of Petitioners Tal Tech and BT-2000's Attempt to Use Tal Tech's Allegation of Fraudulent Condemnation to Establish a Predicate Act Necessary to Support their RICO Claim.

Petitioners argue further that the federal appellate court improperly applied the *Rooker-Feldman* doctrine to bar BT-2000's attempt to use the allegedly fraudulent condemnation of Tal Tech's property as a predicate act to support BT-2000's RICO claim. BT-2000 contends that as a non-party to the condemnation action, BT-2000 cannot be subject to the *Rooker-Feldman* bar under *Lance*, supra., and *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229 (10th Cir. 2006). (Pet. at 21)

Again, Hogan Respondents concede that this Court held in *Lance* that litigants not party to the prior state court action raising the same issue are generally not subject to *Rooker-Feldman*, as discussed above. Here, however, the federal appellate court did not employ the *Rooker-Feldman* doctrine to reject BT-2000's use of the fraudulent condemnation argument as a predicate act to support its RICO claim. Rather, that court rejected BT-2000's attempt to use the "fraudulent condemnation" allegation as a RICO predicate act because "the City, which was responsible for the condemnation, is not a named defendant but is the alleged 'enterprise.'" *Id.* at 1263 n.19 (citations omitted).[16] Thus, the federal appellate

[16] Hogan Respondents note that Petitioners concede that the City and OCURA were named as the "enterprise" for purposes of Petitioners' RICO claim. (Pet. at 3)

court's treatment of BT-2000's attempt to use the fraudulent condemnation argument as a prop for its RICO claim was wholly consistent with, not violative of, both *Lance* and *Mo's Express*.

### C. The Tenth Circuit's Application of the *Rooker-Feldman* Doctrine is not in Direct Conflict with a Decision of this Court or Other Federal Courts.

Petitioners contend that because Tal Tech has not yet set a date for the trial of its challenge to the *amount* of the condemnation award, the 1997 state court condemnation judgment is "pending" in a manner that, under *Exxon Mobil*, should have prevented application of the *Rooker-Feldman* doctrine below despite finality of the Oklahoma County district court condemnation judgment itself. (Pet. at 24)

Hogan Respondents counter that Tal Tech's challenge to the Oklahoma County district court's condemnation judgment was not "pending" under *Exxon Mobil* when Tal Tech brought the action below. Rather, the condemnation judgment was a final order because Tal Tech had as of that date challenged the validity of the condemnation judgment to the fullest extent allowed under Oklahoma and federal law. Specifically, Tal Tech challenged propriety of the condemnation in the initial proceeding, sought to vacate the resultant condemnation judgment for fraud under Okla. Stat. Ann. tit. 12 § 1031.1 in the Oklahoma County district court, appealed the Oklahoma County district court's denial of Tal Tech's fraud challenge to the Oklahoma Court of Civil Appeals, and then unsuccessfully sought certiorari review in both the highest state appellate court and this Court. *City of Okla. City v. Tal Techs., Inc.*, Case No. 94,045 (Okla. Civ. App. July 31, 2001); *Tal Techs.*,

*Inc. v. City of Okla. City*, 535 U.S. 987 (2002); *Tal*, 453 F.3d at 1251. Under Oklahoma law, the propriety of the resulting state court condemnation judgment is therefore unassailable as the law of the case. *Estate of Severns v. Severns*, 1982 OK 64, 650 P.2d 854.[17] The Oklahoma County district court condemnation judgment is thus final for purposes of the application of the *Rooker-Feldman* doctrine.[18]

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[17] Further, Tal Tech's access to the federal judiciary to challenge the Oklahoma County district court condemnation judgment was limited to seeking the United States Supreme Court's review of the opinion of the Oklahoma Court of Civil Appeals via certiorari, 28 U.S.C. § 1257(a), which as previously noted, it did. Finally, the issues raised by Tal Tech herein are based on the same facts underlying the prior petition for certiorari filed with this Court by Tal Tech. See *Tal Techs., Inc. v. City of Okla. City*, Petition for a Writ of Certiorari, No. 01-1147, 2002 WL 32134365.

[18] Petitioners also imply there was error in the federal appellate court's dictum with respect to the Oklahoma County district court's determination that the City's condemnation of Tal Tech's property was for a "public use." Specifically, Petitioners claim the Oklahoma County district court's "public use" finding conflicts with several decisions of the Oklahoma Supreme Court. (Pet. at 6, n.1, 24, n.11); see *Tal*, 543 F.3d at 1257. Hogan Respondents counter that Petitioners' argument does not support a grant of certiorari. First, as noted, the statement by the federal appellate court was dictum. *Id.* Second, the opinions cited by Petitioners were issued by the Oklahoma Supreme Court, not a federal court. Thus, whether the Oklahoma County district court's condemnation judgment complied with Oklahoma common law does not raise an important issue of federal law. Third, Tal Tech concedes it is a party to pending Oklahoma state court challenging the condemnation on these same grounds. (Pet. 7, n.2, 24, n.10) The proper forum for challenging the compliance of the Oklahoma County district court's condemnation judgment with state law is an Oklahoma state court. See *Chandler v. Florida*, 449 U.S. 560, 570 (1981) (United States Supreme Court has no supervisory jurisdiction over state courts and, in reviewing state court judgment, is confined to evaluating it in relation to United States Constitution). In this regard, Hogan Respondents point out that Tal Tech has already been denied certiorari review of its claim that the Oklahoma County district court's condemnation judgment violated the

(Continued on following page)

Petitioners next contend that the federal appellate court's application of *Rooker-Feldman* conflicts with *Exxon Mobil* because Tal Tech has filed yet another state court action seeking to vacate the Oklahoma County district court's condemnation judgment, which challenge was filed after the date of the federal district court order dismissing Petitioners' claims below. (Pet. at 7 n.2, 24 n.10) Hogan Respondents point out that a *subsequent* suit challenging a state court judgment is not the type of pending parallel proceeding contemplated in *Exxon Mobil*. Rather, *Exxon Mobil* states that, if the same claim is pending *simultaneously* in state and federal fora, the fact that the state court entered judgment first would not automatically deprive the federal court of subject matter jurisdiction. *Exxon Mobil*, 544 U.S. at 292. Accordingly, Petitioner Tal Tech's now pending action to vacate, filed in Oklahoma County district court *after* the federal district court dismissed the fraudulent condemnation claims raised below (Pet. at 24 n.10), does not implicate the concerns addressed in *Exxon Mobil*. This Court should therefore decline to grant certiorari.

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United States Constitution. See discussion and citation at note 17, *supra*. Petitioners' allegations do not support a grant of certiorari here.

## CONCLUSION

For the reasons set forth above, the Petition for Certiorari to the Tenth Circuit Court of Appeals has not established any ground for the granting of certiorari in this matter and the Petition should be denied.

Respectfully submitted,

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# REPLY BRIEF

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FILED
FEB 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S

No. 06-823

IN THE

# Supreme Court of the United States

MOSHE TAL; BRICKTOWN 2000, INC.;and TAL TECHNOLOGIES, INC.,

Petitioners,

v.

DAN RANDOLPH HOGAN; TMK/HOGAN JOINT VENTURE, a.k.a. COMMERCIAL REAL ESTATE SERVICES JOINT VENTURE; HOGAN PROPERTY MANAGEMENT, L.L.C.; BRICKTOWN-TMK/ HOGAN PARKING, L.L.C.; BRICKTOWN-TMK/HOGAN ENTERTAINMENT, L.L.C.; MARK D. ELGIN; STONEGATE MANAGEMENT COMPANY, L.L.C.; ELGIN DEVELOPMENT COMPANY, L.L.C.; TDC COMPANY, L.L.C.; and, TIANA P. DOUGLAS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

## PETITIONERS' COMBINED REPLY TO ALL RESPONDENTS' BRIEFS IN OPPOSITION

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## TALS' COMBINED REPLY TO BRIEFS IN OPPOSITION

## I. INTRODUCTION.

Petitioners, Bricktown 2000, Inc. ("BT-2000""); Tal Technologies Inc. ("TTI"); and, Moshe Tal ("Tal") (collectively the "Tals"), respectfully submit this Combined Reply to Respondents the Hogans' and Douglas's (the "Respondents") Briefs in Opposition to Tals' *Petition for A Writ of Certiorari* ("Opposition Brief(s)" or "Opposition(s)").

The Tals' exposition of law and fact in their Petition for A Writ of Certiorari adequately addresses the legal and factual issues raised in the Respondents' Briefs in Opposition. Thus, the main purpose of this Reply is to address the Respondents' inaccurate representations and omission of critical facts, prior court rulings, and relevant authorities/rulings in an attempt to support their positions.[1]

## II. TAL BECAME A PUBLIC ADVOCATE AFTER DISCOVERING CORRUPTION.

### A. Moshe Tal's Efforts to Combat Corruption.

Both the Hogans and Douglas use their Briefs in Opposition as forums for personal attacks on Moshe Tal attempting to "paint" him as a "disgruntled" person a "sour-grapes" loser and a "serial litigator". They claim Moshe Tal decided - after losing his bid for the Urban Renewal's Redevelopment contracts, and/or losing his attempt to stop the City's condemnation of his (TTI's) property - to file numerous *Qui Tam* suits for the improper purpose of retaliation and stopping and/or delaying the Redevelopment of the City's MAPS Bricktown projects. They contend that Moshe Tal's unrelenting efforts to vindicate the wrongs committed by the Hogans and Douglas against the taxpayers

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[1]The Tals would also like correct an error they made in citing *Pelfresne v. Stephens*. In their Petition for a Writ of Certiorari, p. 17, fnt 16, the Tals cited that case as 35 F.Supp.2d 1964 (E.D. Ill. 1999), instead of 35 F.Supp.2d 1064. Further, in respond to the Hogans' motion to dismiss for failure to properly format, the Tals would state that in compliance with USSC Rule 33(1)(b) the Petition is written in 11 point Times New Roman with 9 point footnotes.

of Oklahoma City, as well as Moshe Tal individually and his corporations, makes him a "serial litigator" who continually pursues unfounded claims in a effort to seek revenge. These *ad hominem* attacks are improper and have no place in this proceeding.

Rather, the facts show that Moshe Tal, like most *Qui Tam* relators, brought these actions after he uncovered massive amounts of governmental corruption and fraud against the taxpayers. After Tal submitted (on behalf of BT-2000 and it's CCBT Joint Venture) his Redevelopment RFP proposal, he discovered a high degree of corruption among the Hogan Group and numerous public officials, including, but not limited to, a conspiracy to rig the RFP process. The corruption was especially evident in that numerous public officials had personal and/or financial interests in these Redevelopment and Parking contracts (as detailed in the Second Amended Petition, the RICO Case Statement, and the Petition for Writ of Certiorari).[2] These officials' holding of such interests is strictly prohibited by Oklahoma law.

After Tal discovered the corruption and conflict of interests in the RFP process, which resulted in the personal damages to himself and his corporate entities, Tal then discovered that the Hogan Group, together with numerous public officials, was also engaged in an unlawful misappropriation of million of dollars of Tax Funds. With this discovery, Tal formed a Citizens/Taxpayers Group,[3] and filed *Qui Tam* Written Demands for each purported public project where Tax Funds were unlawfully expended. THG is still an active Taxpayers "Watch-Dog" entity and has other *Qui Tam* suits pending[4]

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[2] At least 3 out of the 5 Urban Renewal Commissioners has business relationship with the Hogan Group, and 2 of these Commissioners are actual partners in the subject Redevelopment and Parking contracts.

[3] Initially called *Taxpayers Against Ripoffs* ("T.A.R.") and subsequently incorporated as non-profit corporation under the name *Taxpayers for Honest Government, Inc.* ("THG").

[4] The Bass Pro related *Qui Tam* suit is pending litigation in the Oklahoma County State Court - *Urban Renewal v. City of OKC v. Tal & THG, et al.*, CJ-03-2826, after being remanded by the Oklahoma Supreme Court, *Oklahoma City Urban Renewal Authority v. the City of Oklahoma City, et al.*, 110 P.3d 550, 559 (Okla. 2005).

This is not the first time that the Hogans and Douglas engaged in such personal attacks on Tal. In the prior *Qui Tam* suits, the Hogans and Douglas, along with the *Amicus* here (the City of Oklahoma City ["City"] and Oklahoma City Urban Renewal Authority ["URA" or "Urban Renewal"]), claimed that Tal initiated the *Qui Tam* suit for an improper purpose and as "retaliation" for losing his personal interest in the Bricktown Redevelopment (RFP) contracts. However, the Oklahoma Supreme Court rejected the Hogans' and Douglas's contentions and held that the attacks on Moshe Tal's motives were unfounded. In *Tal IV* (*The State of Oklahoma, ex rel. Tal v. The City of Oklahoma City, et al.*, 61 P.3d 234 (Okla. 2002)), the Oklahoma Supreme Court held:

> [I]t would also be inappropriate to conclude T.A.R. filed suit merely for the improper purpose of delaying the development of certain Bricktown projects because Mr. Tal was an unsuccessful bidder on some Bricktown projects. It is simply not unusual for an unsuccessful bidder on a public project to bring a qui tam-like proceeding questioning the legality or validity of a contract or transaction that has actually been awarded. [citation omitted]. . . . Yes, the transaction(s) or contract(s) attacked as unlawful were sought to be constrained by the plaintiffs, but that is no different than in the vast majority, if not all, *qui tam* suits. Further, that monetary gain was part of the motivation for the *qui tam* suit is also not a valid indicator of some improper purpose. Section 373 itself provides for a reward to the taxpayer that vindicates the public fisc through the means of a *qui tam* lawsuit. (Emphasis added). *Id., Tal IV*, at P31, 61 P.3d at 248-249.

**B. Douglas'sAdditional Attempts to Discredit the Tals.**

Douglas continues to try and discredit Moshe Tal and characterize the litigation brought by the Tals as frivolous by relying on dissenting opinions, taking statements out of context and omitting additional facts and rulings by the Oklahoma courts. She begins by misstating the record and attributing a remark by the dissent as the opinion of the

majority of the Oklahoma Supreme Court.

> Undaunted, Tal filed yet another *qui tam* suit on March 15, 2000, against Oklahoma city, OCURA, and a plethora of individual and companies. [footnote omitted] (Pet. App., at A7). The matter was once more dismissed by the trial court. On appeal, the Oklahoma Supreme Court recognized the blatant abuse of process engaged in by Tal..." (Emphasis added). *Id.*, Douglas Response, at p. 4.

First, the statement that ... "Tal filed **yet another** *qui tam* suit in March 15, 2000..." is untrue. The March 15, 2002 suit was the first Qui Tam suit filed by Tal.[5] The earlier *Qui Tam* suit, (*Tal I*), was the friendly Declaratory Judgment suit filed by the City against URA. Second, the statement that: "the Oklahoma Supreme Court recognized the blatant abuse of process engaged in by Tal..." is false. Such "finding" was not that of the Oklahoma Supreme Court's majority, but rather, the personal opinion of the dissenting justice.

Douglas continues her unfounded suppositions, stating: "[k]nowing he would face harsh sanctions with continued litigation in state court, Tal turned his efforts to the United States District Court." Douglas Opposition, at p. 5, fn 10. She then erroneously concludes:

> Tal was actually sanctioned, harshly, by the Oklahoma County District Court in direct response to the bad faith misconduct exhibited in his unending legal filings. Although the Supreme Court of Oklahoma reversed the lower court's attorney fee's award, the proverbial handwriting was on the wall - any further state court litigation would likely be met with punitive measures. *See, State ex rel. Tal v. City of Oklahoma City*, 61 P.3d 234 (Okla. 2002). Douglas Opposition, p. 5 footnote 10.

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[5] *State, ex rel Tal v. City of Oklahoma City*, 19 P. 3d 268 (Okla. 2000) was referred to by the Oklahoma Supreme court as *Tal III*. *Tal II*, was a another, unrelated *qui tam State, ex rel. Tal v. Norick, et al*, 991 P.2d 999 (Okla. 1999),relating to the unlawful expenditure of tax funds for the construction of a Ballpark. That suit was dismissed as being premature.

Such statements are false, or at best, very misleading. Seven of nine Oklahoma Supreme Court justices held that there was no bad-faith conduct on Tal's part and the trial court abused its discretion in sanctioning Tal and TAR. The language of their opinion certainly did not presage "punitive measures"— there was no proverbial handwriting on the wall. Rather, in *Tal IV* when the Oklahoma Supreme Court held the trial court abused its discretion in granting sanctions against the *Tals* it stated:

> A review of the record in these appeals leads us to conclude the plaintiffs were not sanctioned for any actual litigation misconduct or culpable conduct of their own, such as providing their attorney with incorrect facts, or some similar conduct that would involve the clients' own bad faith litigation misconduct. . . . The conduct sanctioned, as we see it, was for having the lawsuit filed and for mounting a response to the motions to dismiss. *Tal IV*, 61 P.3d 234, 248-249 (Okla. 2002).

Clearly, there was no ... "proverbial handwriting on the wall"that "any further state court litigation would likely be met with punitive measures." In fact, despite the filing of two subsequent actions in 2003, neither the Tals nor THG have been sanctioned. Although the trial court granted partial summary judgment(s) to the City and URA in one action, the Oklahoma Supreme Court reversed in favor of Tal and THG and remanded the case back to the trial court - to allow THG and Tal to litigate their *Qui Tam* claims. *See, Tal V, Oklahoma City Urban Renewal Authority v. the City of Oklahoma City, v. Tal, et al.*, 110 P.3d 550, 559 (Okla. 2005).[6]

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[6] If anything, after the reversal of the sanctions against Tal/Taxpayers (*Tal IV*), the City and all Respondents knew they would be unable to intimidate Tal or THG members with sanctions. However, they did not stop their attempt to scare the Taxpayers, and after Tal/THG filed their 2003 Written Demand, the City's Municipal Counselor, William Burkett ("Burkett"), filed a libel suit against Tal and THG members, claiming the allegations in the Written Demand were false and libelous. The trial court granted summary judgment against Burkett (dismissing his libel suit), the Court of Appeals affirmed, and the Oklahoma Supreme Court not only denied Burkett's Petition for Writ of Certiorari, but issued an Order releasing the Court of Appeals Opinion for publication, and further ordered that Opinion to be given precedential effect. *See, Burkett v. Tal,*

## III. THIS COURT MAY REVIEW THE DISTRICT COURT'S DISMISSAL OF MOSHE TAL'S CLAIMS ON THE GROUNDS OF *RES JUDICATA*.

In the Tals' Petition for Certiorari, Moshe Tal seeks review of the district court's dismissal of his individual claims on the grounds of *res judicata*, claim and issue preclusion. The district court dismissed Moshe Tal's individual claims on the grounds that those claims were barred by *res judicata* based on Moshe Tal's status as the relator in various *Qui Tam* actions brought in the Oklahoma State Courts. The district court stated that Moshe Tal should have joined his personal claims in the *Qui Tam* suits. Moshe Tal appealed this issue to the Tenth Circuit including it both in the Notice of Appeal in his briefs on appeal. However, the Tenth Circuit neglected to address the issue in its decision to uphold the district court's dismissal of all claims raised by the Tals.

Noting that the Tenth Circuit failed to address the issue of *res judicata*, Moshe Tal nevertheless raised and briefed the issue of *res judicata* in his Petition for a Writ of Certiorari. In their Briefs in Opposition, both the Hogans and Douglas claim that because the Tenth Circuit did not address the issue, it cannot be raised on certiorari. This contention is incorrect.

The failure of a court of appeals to address an issue decided by the district court does not prevent this Court from reaching the issue. *New York City Transit Authority et al. v. Beazer et al.*, 440 U.S. 568; 99 S. Ct. 1355, 1364; 59 L. Ed. 2d 587 (1979). This Court may appropriately reach an issue in a case when it has been fully aired before the district court, it involves application of settled legal principles to uncontroversial facts, it has been carefully briefed and neither party has asked for remand to have the court of appeals decide the issue. *Id.*

Under this Court's ruling in *New York City Transit Authority et al. v. Beazer et al,* the circumstances of the present case permit review of the district court's ruling on *res judicata* despite the Tenth Circuit's

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*et al.*, 94 P.3d 114 (Okla. 2004).

failure to rule on the issue. The issue of *res judicata* was fully heard by the district court and ruled on by that court. This is even admitted by the Hogans in fn 13, p. 20, wherein they *"acknowledge that the district court judge's oral pronouncement of his anticipated ruling mentioned res judicata as a possible basis for the dismissal of Petitioner Tal's claims."* Further, *res judicata* is a settled principle of law and it is to be applied to the undisputed fact that Moshe Tal did not join his personal claims in the *Qui Tam* suits in which he was the relator. Moreover, issue of *res judicata* has been carefully briefed by the Tals in the Petition for Certiorari and by all parties in the action below. Finally, none of the parties have asked for remand to the Tenth Circuit for a decision on the issue.

The issue of *res judicata* has been properly raised in the Tals' Petition for Certiorari and may be heard by this Honorable Court.

## IV. THE HOGANS' AND DOUGLAS'S MISSTATEMENT OF FACTS REGARDING THE SCOPE OF AND ISSUES DECIDED IN THE OKLAHOMA STATE COURTS.

Although they claim *res judicata* cannot be raised in the Petition for Certiorari, the Hogans and Douglas dedicate several pages of their Opposition Briefs to discussions of prior state court litigation that the Federal District Court found to be *res judicata* as to Moshe Tal's personal claims. The Hogans and Douglas contend that based upon this state litigation, the redevelopment contracts and fraudulent condemnation issues in this federal suit, were 1) "previously adjudicated" and 2) declared "legal" in 3) "related" *Qui Tam* suits, 4) "initiated" by Moshe Tal. While they do not rely on *res judicata* as a bar, their only purpose in making these assertions, is to show that the claims have already been litigation and are barred by issue and claim preclusion. Their alternative purpose is also to show that for purposes of the *Rooker-Feldman* Doctrine, these issues have been decided by a state court and are thereby barred from relitigation in federal court.[7]

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[7]Application of the *Rooker-Feldman* Doctrine was fully briefed in the Tals' Petition for Certiorari and will not be reargued here. However, the discussion of the actual facts and issues in this Reply Brief apply to the *Rooker-Feldman* issue, insofar as the facts clarified herein show that the issues decided in the prior state court litigation do not preclude the Tals' federal court litigation of

As discussed fully in the Petition for Certiorari, based upon the actual parties joined and facts and issues raised in the prior litigation, and the existence of parallel state court proceedings, neither *res judicata* nor the *Rooker-Feldman* doctrine bar any part of the present litigation from proceeding in federal district court

**A. The Issues Raised and Decided in the Prior *Qui Tam* Related Suits.**

The Respondents fail to truthfully represent the issues litigated in the prior *Qui Tam* suits and fail to mention critical rulings by the Oklahoma Supreme Court in these prior *Qui Tam* suits.

**i. Scope of Issues Decided in *Tal I*.**

The Hogans and Douglas attempt to use *Tal I* to show that the issues raised in this federal action were raised and litigated in *Tal I*. They also use it to assert that the Oklahoma Court declared their conduct legal. This is patently untrue. The only issue on appeal was the denial of Tal/T.A.R.'s motion to intervene. The Oklahoma Supreme Court did not hold that the redevelopment contracts were "valid, legal and constitutional. Nor did the court review the legality of the condemnation as asserted by Douglas. Douglas' Opposition, pp. 3-4.

The first *Qui Tam* related suit, designated as *"Tal I"*, was not even filed by Tal, but rather it was a friendly suit (Declaratory Judgment) filed by the City of against URA and the Hogans. *City of Oklahoma City v. Urban Renewal Authority, et al.*, 988 P.2d 901 (Okla. 1999). When the City failed to raise most of the issues in the Written Demand, T.A.R./Tal attempted to intervene in that action to adjudicate those issues. T.A.R/ Tal's motion to intervene was denied and they appealed. That intervention was the only issue on appeal is made clear by the Oklahoma Supreme Court's decision in *Tal IV*:.

> [I]n *Tal I* it was expressly stated that only the narrow issue of whether the trial court erred in denying taxpayers' motion to

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the issues raised in this action.

> intervene (and a related motion for a continuance) was before this Court. *Tal I, 1999 OK 71, at P14, 988 P.2d at 905. Tal I* also, in effect, ruled that because taxpayers were properly denied intervention they were excluded as party litigants and had no standing to tender for our review in that appeal any errors that may have been made in the judgment upholding the Agreements as lawful. *Tal I, 1999 OK 71, at P23, 988 P.2d at 906.* Thus, although *Tal I* discussed the Agreements, it did not affirm the trial court judgment declaring their lawfulness [ *Tal I,* 1999 OK 71, at P0 and P31, 988 P.2d at 902 and 908]. *Tal IV*, 61 P.3d at 241.

Douglas' and the Hogans' declarations that in *Tal I* the Oklahoma Supreme Court ruled on the issues asserted in this federal litigation are not supported by the facts and must be disregarded.

**ii. Pending State Litigation.**

The Hogans and Douglas also claim that for purposes of the *Rooker-Feldman* Doctrine, there is no parallel state litigation on the issues of fraudulent condemnation or intentional interference with business. Their claim is without support in fact.

As shown in Tals' 12/14/06 Petition for Certiorari, the condemnation proceedings in the Oklahoma state court are still pending in two separate actions. *See* fn 10 to Tals' Petition; *City of Oklahoma City v. Tal Technologies Inc.*, CJ-97-2034 (the initial condemnation suit); and *Tal, et al., v. Hogan, et al.*, CJ-04-7943 (asserting, *inter alia* claims for fraudulent condemnation and intentional interference with business) (collectively "pending/parallel litigation").

The initial condemnation suit has been pending since 1997. The second condemnation action was filed in 2004.("2004 Condemnation"). In the 2004 Condemnation, the Hogans and Douglas moved to dismiss the suit on the grounds of *res judicata.* They claim that the fraudulent condemnation issue and the tortious interference with business were already litigated in this federal suit (despite the fact that the federal court dismissed these state claims without prejudice). In that same action, Tal moved to disqualify the trial judge

based on collusion between the judge and the Hogans and Douglas, and a showing of bias and prejudice. Before the disqualification issue was fully litigated, the trial court granted the Hogans' and Douglas's motions to dismiss, holding that the federal district court's dismissal of those claims was *res judicata*.

In an action for extraordinary writ, the Oklahoma Supreme Court granted Tal's Petition for A Writ of Mandamus and Prohibition, and reversed the trial court's dismissal of the 2004 Condemnation. *See* Oklahoma Supreme Court's 11/27/06 Order, www.oscn.net, Appeal No. 103853. Thereafter, the trial judge recused herself from the case. Thus, Tal's claims for fraudulent condemnation and tortious interference are pending while awaiting reassignment.

Therefore, for purposes of application of the Rooker-Feldman Doctrine, there is, in fact, parallel state litigation where the questions of fraudulent condemnation and intentional interference with business remain pending.

## V. CONCLUSION

For the reasons stated in Tal's Petition for A Writ of Certiorari and herein, Tal's Petition should be granted.

Respectfully submitted,

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